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In the Supreme Court of the United States

OCTOBER TERM, 1989

IN RE VICTOR H. VAN SANT, PETITIONER

ON PETITION FOR A WRIT OF MANDAMUS TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was deprived of any constitutional or statutory right by the Federal Circuit Court of Appeals' decision to issue an unpublished opinion, not citable as precedent, dismissing for lack of jurisdiction his appeal from an adverse decision of the Merit Systems Protection Board.

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OPINIONS BELOW

The following decisions are not reported: the opinion of the court of appeals for the Federal Circuit (Pet. App. A1-A10); the third decision of the Merit Systems Protection Board (MSPB) dismissing petitioner's appeal for lack of jurisdiction (Pet. App. A11-A23); the fourth decision of the Fourth Circuit Court of Appeals, upholding the district court's determination that petitioner was properly discharged from the United States Postal Department as of December 7, 1971 (Pet. App. A24-A28); the third decision of the district court, upholding petitioner's termination as of December 7, 1971 (Pet. App. A29-A47), on review of the MSPB's second decision, following an evidentiary hearing, upholding petitioner's termination as of October 12, 1971, *Van Sant* v. *United States Postal Serv.*, MSPB Case No. DC0351802006REM (Jan. 10, 1984); the third decision of the Fourth Circuit Court of Appeals, reversing the district court and remanding to the MSPB for a second evidentiary

hearing on the issue of petitioner's termination, *Van Sant* v. *United States Postal Serv.*, 705 F.2d 447 (Mar. 24, 1983) (Table); the second decision of the district court, *Van Sant* v. *United States Postal Serv.*, No. 81-769 (E.D. Va. Feb. 11, 1982), upholding the MSPB's determination, after a hearing on remand, that petitioner was properly discharged on October 12, 1971, see *Van Sant* v. *United States Postal Serv.*, MSPB Case No. DC035100006 (June 11, 1980); the second decision of the Fourth Circuit Court of Appeals, dismissing for lack of jurisdiction an appeal from the decision of the MSPB on remand, *Van Sant* v. *United States*, 660 F.2d 494 (Apr. 28, 1981) (Table); the first decision of the Fourth Circuit Court of Appeals, reversing the district court and remanding to the MSPB for an evidentiary hearing, *Van Sant* v. *United States Postal Serv.*, 605 F.2d 1207 (Sept. 7, 1979) (Table); the first decision of the district court affirming the original Civil Service Commission decision upholding petitioner's termination as of October 12, 1971, *Van Sant* v. *United States*, No. 77-756 (E.D. Va. Apr. 27, 1978).

JURISDICTION

The judgment of the court of appeals (Pet. App. A50) was entered on October 6, 1989. A petition for rehearing was denied on November 3, 1989 (Pet. App. A51-A52). The petition for a writ of mandamus was filed on January 31, 1990.[1]

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[1] This Court has jurisdiction to grant a writ of mandamus in an appropriate case under 28 U.S.C. 1651. Although styled solely as a petition for a writ of mandamus, petitioner's question B (Pet. 3) asks whether "[i]n the alternative," a writ of certiorari should issue. However, Rule 12.2 of this Court's rules states: "A petition for a writ of certiorari shall not be joined with any other pleading."

STATEMENT

This case is the latest chapter in petitioner's protracted effort to obtain backpay and reinstatement for the allegedly improper termination of his employment as a planning architect with the United States Postal Department. After extensive litigation, including two trips to this Court, four to the Fourth Circuit and most recently one to the Federal Circuit, petitioner now urges the exercise of this Court's supervisory mandamus power to review the Federal Circuit's local publication Rule 47.8, which, he alleges, violated his rights to due process and equal protection by depriving him of proper appellate review of his claims.

1. On October 12, 1971, petitioner, an employee with the United States Postal Department, was terminated as a result of a reduction-in-force (RIF) when the United States Postal Department was abolished and the United States Postal Service came into being. Pet. App. A2. After extensive litigation in the Eastern District of Virginia and the Fourth Circuit, which resulted in two evidentiary hearings before the MSPB on the lawfulness of petitioner's termination,[2] the district court finally ruled that the termination was valid but that its effective date should have been December 7, 1971, rather than October 12, 1971. Pet. App. A27-28, A35-39, A44-47. In particular, the district court held that since there was no longer a permanent position of planning architect at the United States Postal Service, the termination was proper. Pet. App. A32-A47. However, because four architects on a detail from the Postal Department to the Army Corps of Engineers performed tasks

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[2] This litigation focused on alleged procedural defects in the decision of the Civil Service Commission (the predecessor to the Merit Systems Protection Board) to enforce the termination of petitioner as part of the RIF at the Postal Department. See, *e.g.*, Pet. App. A15-A16, A25.

formerly performed by petitioner until December 7, 1971, petitioner's termination was valid only as of that date. *Ibid.* The Fourth Circuit affirmed the "factual and legal conclusions of the district court" (Pet. App. A28), denying petitioner's claims for reinstatement and backpay for the entire period from his October 12, 1971 termination to the date of reinstatement. Pet. App. A27-A28. This Court denied certiorari. *Van Sant* v. *United States Postal Serv.*, 475 U.S. 1082 (1986).

2. Some years later,[3] in February 1988, petitioner returned to the Merit Systems Protection Board, again seeking reinstatement and backpay on the theory that the district court's modification of the effective date of termination was a new termination subject to de novo review and that the district court's order was *ultra vires*. The MSPB explained that, in "requesting the Board to order his reinstatement with back pay, notwithstanding the [district and appeals' courts'] order[s] to the contrary," petitioner was asking the Board to "set aside an order of an Article 3 court." Pet. App. A21. The Board concluded that it lacked the authority to review and invalidate the court of appeals' order and dismissed the appeal. Pet. App. A21-A22.

3. Petitioner appealed to the Federal Circuit, and the court of appeals dismissed the appeal in an unpublished opinion. Pet. App. A2. The court decided, first, that it had

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[3] In the interim period, petitioner was engaged in extensive attorneys' fees litigation over the portion of the claim upon which he prevailed: backpay for a period of approximately three months from October 12, 1971, to the date his revised December 7, 1971 notice of termination went into effect. See U.S. Memo in Opp., *Van Sant* v. *United States*, No. 85-1096, at 3 n.1. He petitioned the Fourth Circuit for $200,000 and the Fourth Circuit awarded him $5,000, declaring that petitioner's case was of "little merit." *Van Sant* v. *United States Postal Serv.*, 805 F.2d 141, 142 (1986). This Court denied certiorari on the attorneys' fees question. *Van Sant* v. *United States Postal Serv.*, 480 U.S. 935 (1987).

no jurisdiction over the appeal. *Id.* at A6-A8. It noted that the savings clause of the Civil Service Reform Act (CSRA) transferred jurisdiction to review MSPB decisions from the district courts to the Court of Claims and the courts of appeals after January 11, 1979, and that, under the Federal Courts Improvement Act of 1982, the Federal Circuit succeeded to this jurisdiction over MSPB decisions. *Id.* at A6-A7. The regional district courts, however, retained jurisdiction for all administrative proceedings pending on January 11, 1979. *Ibid.* Since petitioner's case was on appeal to the Fourth Circuit on that date, the Federal Circuit ruled that his claim was pending on the effective date of the CSRA, and that it therefore had no jurisdiction over the claim. *Id.* at A7-A9.

The court also declined to transfer petitioner's appeal to the United States District Court for the Eastern District of Virginia—the otherwise proper forum for the case (Pet. App. A9-A10)—finding that

> All of the arguments on the merits that the petitioner makes were fully considered and rejected by the United States District Court for the Eastern District of Virginia and the Court of Appeals [for] the Fourth Circuit in the several prior cases.

Id. at A9. Because the issues raised by petitioner had already been fully considered and rejected by the courts on not one, but several occasions, the Federal Circuit concluded that it would not be "in the interest of justice" within the meaning of the transfer statute, 28 U.S.C. 1631 (1982), to transfer the case to the district court. *Id.* at A9-A10.

ARGUMENT

Petitioner now contends (Pet. 17-24, 44-45) that the failure of the Federal Circuit to publish its decision dismissing his appeal for lack of jurisdiction deprived him of

effective appellate review in violation of constitutional and statutory guarantees of due process and equal protection. Petitioner urges this Court to exercise its supervisory mandamus jurisdiction to invalidate the Federal Circuit's local Rule 47.8, which permits the unpublished disposition in this case.

1. Petitioner's argument that he has been denied effective appellate review is belied by the long litigation history of this case, including several decisions by the district court and the Fourth Circuit. As the Federal Circuit correctly noted, these courts have fully considered and rejected on the merits petitioner's challenge to his 1971 termination. Pet. App. A9-A10. Rule 47.8, which sets forth criteria for the publication of Federal Circuit decisions and criteria regarding when unpublished decisions may be cited as precedent, simply has not operated to deny petitioner appellate review.

Indeed, the bar against citation of unpublished decisions imposed by Rule 47.8 does not even apply here. A party may always appeal from or seek review of a decision adverse to him; the bar against citation applies only when a party seeks to rely on the precedential force of other decisions to which he is not a party. Thus, if there were some unpublished decision in the Federal Circuit upon which petitioner wished to rely for a legal proposition in his own case, Rule 47.8 might apply. But here, petitioner has no standing to challenge Rule 47.8 since it has not caused him any injury in this proceeding. Thus, consideration of petitioner's elaborate and broad attack (Pet. 17-47) on the courts of appeals' publication rules, and the Federal Circuit's Rule 47.8 in particular, is unwarranted.

2. Petitioner's suggestion (Pet. 33-34, 45) that the Federal Circuit's summary or cursory review of his claim warrants the exercise of supervisory mandamus is also without merit. First, the Federal Circuit correctly ruled that petitioner's claim was pending on the effective date of the

CSRA and that it therefore had no jurisdiction over the appeal. Pet. App. A6-A9. The Federal Circuit then correctly determined that it would be a waste of judicial resources to transfer petitioner's claim to the regional district court, since petitioner had had multiple opportunities to challenge his 1971 termination before the MSPB, the district court, and the court of appeals.

Finally, it should be noted that this Court has already denied review of the merits of petitioner's claim that his discharge was unlawful. See 475 U.S. 1082 (1986). In particular, this Court declined to consider petitioner's convoluted arguments, which he again presses here (see Pet. 48-53), that, by finding petitioner's discharge valid as of December 7, 1971, the district court unlawfully effected a new termination as of that date. See U.S. Memo in Opp. at 4-5, *Van Sant* v. *United States Postal Service*, No. 85-1096 (refuting petitioner's argument that, under *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947), the district court lacked authority to modify petitioner's termination date, and that petitioner was therefore entitled to back pay and reinstatement to his actual date of termination, October 12, 1971). In sum, petitioner's substantive contentions arising from his 1971 discharge have received plenary review by the court of appeals, and have previously been found unworthy of review by this Court. Petitioner has provided no reason for a different disposition here.

CONCLUSION

The petition should be denied.

Respectfully submitted.

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